No. 8

# In the Supreme Court of the United States

OCTOBER TERM, 1950

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
PETITIONER

*v.*

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR RESPONDENTS

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## BRIEF FOR RESPONDENTS

### OPINIONS BELOW

The order of the District Court for the District of Columbia dismissing the complaint was entered without opinion (R. 28–29). The opinion of the Court of Appeals for the District of Columbia Circuit (R. 29–48) is reported at 177 F. 2d 79.

### JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1949 (R. 49). A petition for rehearing, filed August 26, 1949 (R. 50), was

denied on September 22, 1949 (R. 51). On December 12, 1949, by order of Mr. Chief Justice Vinson, the time for filing a petition for a writ of certiorari was extended to, and including, January 25, 1950 (R. 53). The petition for a writ of certiorari was filed on January 25, 1950, and was granted on March 13, 1950 (R. 54). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether petitioner has any legal standing or right to challenge a designation, made by the Attorney General pursuant to instructions issued by the President under Executive Order 9835, that petitioner is a communist organization.

## STATUTE AND EXECUTIVE ORDER INVOLVED

Section 9A of the Hatch Act, 53 Stat. 1148, 5 U. S. C., Supp. II, 118j, and Executive Order 9835, 12 F. R. 1935, are set forth in the Appendix to the Brief for Respondents in *Bailey* v. *Richardson*, No. 49.

## STATEMENT

On March 21, 1947, the President, "by virtue of the authority vested in [him] by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i),[1]

[1] Now 5 U. S. C., Supp. II, 118j.

and as President and Chief Executive of the United States," issued Executive Order 9835 (12 F. R. 1935) to establish standards and machinery for determining the loyalty of federal employees and applicants. The Executive Order provided for the investigation of all persons now employed by the Federal Government or applying for such employment, for the establishment of Loyalty Boards in each department or agency, and for the establishment within the Civil Service Commission of a Loyalty Review Board. The Department of Justice was directed to furnish the Loyalty Review Board with "the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." (Part III, Section 3.) In turn, the Loyalty Review Board was directed to disseminate such information to all departments and agencies (Part III, Section 3a).

The standard prescribed by the Executive Order for the refusal of employment, or the removal from employment, on grounds relating to loyalty is that "on all the evidence, reasonable

grounds exist for belief that the person involved is disloyal to the Government of the United States" (Part V, Section 1). One of the activities and associations which "may" be considered in connection with the determination that reasonable grounds exist for belief that a person is disloyal is membership in, affiliation with, or sympathetic association with any organization listed by the Attorney General (Part V, Section 2f).

On November 24, 1947, the Attorney General addressed a letter to the Chairman of the Loyalty Review Board, listing organizations and groups determined by him to fall within the description of Part III, Section 3, of Executive Order 9835. 13 F. R. 1471. Petitioner was included in this list. By letter dated December 4, 1947, the Chairman of the Loyalty Review Board transmitted a copy of the Attorney General's letter to the various departments and agencies, pursuant to Part III, Section 3a, of the Executive Order. 13 F. R. 1471. In September 1948, the Attorney General divided the listed organizations into the separate categories named in the Executive Order, and petitioner was designated as a communist organization. This, too, was transmitted by the Chairman of the Loyalty Review Board. 13 F. R. 1635.

Petitioner alleges that, as a result of this designation and publication by the Attorney General, its ability to carry out its charitable activities

of collecting and disbursing funds for the benefit of anti-fascist refugees who fought against the Franco Government in Spain has been irreparably damaged (R. 3–4). The injuries alleged are these: (a) the Bureau of Internal Revenue has deprived petitioner of its status as a tax exempt organization; (b) petitioner has been refused licenses required of organizations soliciting funds; (c) many former contributors, including present and prospective Federal employees, have reduced or discontinued contributions; (d) many potential contributors, including present and prospective Federal employees, have declined to make contributions; (e) petitioner has encountered increased difficulty in renting space to conduct activities, and reservations of facilities have been cancelled; (f) prominent speakers and entertainers refuse to participate in petitioner's activities; (g) and members and other participants have been subjected to public shame and ridicule, thereby discouraging further participation (R. 6).

This action was brought on February 10, 1948, to enjoin respondents, the Attorney General and the Chairman and members of the Loyalty Review Board of the Civil Service Commission, from designating and publicizing the name of petitioner as a communist organization, and to direct respondents to remove petitioner's name from the list of designated Communist organizations, to make a public statement of this removal,

and to take no action based on the inclusion of petitioner's name in the list of designated communist organizations. Petitioner further prayed for a declaratory judgment that Executive Order 9835, and Section 9A of the Hatch Act, as applied by the Executive Order, are unconstitutional because repugnant to the First, Fifth, Ninth, and Tenth Amendments (R. 7, 8). Simultaneously, petitioner moved to convene a three-judge court pursuant to 28 U. S. C. 380a, and for a preliminary injunction (R. 8–10).

Respondents, in turn, moved to dismiss the complaint for want of a justiciable controversy between the parties and for failure to state a claim upon which relief can be granted (R. 28). Following a hearing, the District Court, on June 4, 1948, dismissed the complaint and denied the motion for a preliminary injunction (R. 28–29). The Court of Appeals, one judge dissenting, affirmed (R. 49).

## SUMMARY OF ARGUMENT

### I

A. Petitioner lacks standing to assert that the loyalty program, or any aspect of it, is void under the First Amendment. The Executive Order and the Attorney General's list of organizations do not, in their genesis, on their face, or in their operation purport to control petitioner's activities. Petitioner remains perfectly free to collect and disburse funds in the same manner as it

has always done; it is free to conduct meetings and other functions, to express itself freely through its officers and members; it is not prevented in any fashion from uttering, or publishing and distributing its beliefs. Insofar as petitioner's fund-raising abilities may have been impaired as the result of unfavorable public opinion, such indirect consequences of the publication of investigative findings have no legally operative effect on First Amendment rights. However, if it be assumed *arguendo* that adverse publicity constitutes a sufficiently direct "discouragement" to give standing to petitioner, it is clear that, in the particular circumstances presented, the challenged executive action stands consistently with the First Amendment.

B. Petitioner argues, however, that more than publicity is here involved. It asserts that the Attorney General's designation definitively fixed its status for all purposes under the Executive Order and hence is a regulation directly affecting it whose validity it has standing to review. We do not dispute that a determination of status which unconditionally subjects a person to legal consequences may give rise to a justiciable claim by such person. And recognizable derivative claims may also exist in one who has been deprived of an advantageous legal relationship with the person or group directly controlled. But we believe that petitioner can not qualify in either category

so as to attain standing to challenge the administration of the Executive Order.

1. Petitioner's own existing or future legal status remains unchanged. Neither the Executive Order nor the Attorney General's list contain any directive to other federal, state, or municipal officials which in any way subjects petitioner to the contingency of future administrative action. They subject petitioner to no criminal or civil penalties either immediate or postponed. Accordingly, no occasion for ~~federal~~ future action is presented; the controlling principle is familiar. See *e. g.*, *United States* v. *Los Angeles & St. L. R. Co.*, 273 U. S. 299.

2. Petitioner's case is not improved by considering its standing as derivative. The designation of petitioner as a Communist organization creates no justiciable controversy between the Government and those Federal employees who may be members of petitioner. The Executive Order does not require such employees to disassociate themselves from petitioner's activities nor does it bar other federal employees from becoming members. Participation in the activities of a designated organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion based on all the evidence that reasonable grounds exist for belief that the employee involved is disloyal. Since petitioner's designation by the Attorney General does not, as to any of its members who may be federal employees, impose

any obligation, deny any right, or fix status, such employees have no standing to challenge that designation. Since the designation does not result in the unconditional regulation of petitioner's relationships with federal employees, it follows *a fortiori* that petitioner likewise has no standing.

## II

A. Petitioner further urges that it has been defamed by the Attorney General's designation, and that, although it "cannot sue in libel" it does have standing to obtain equitable relief. Relief in the suit for defamation thus pleaded is barred, however, by a long recognized privilege. As petitioner concedes, it is well settled that utterances public officials made in the exercise of official duties are absolutely privileged. The important principles of public policy upon which the privilege is grounded require its application to suits in equity as well as in law.

B. The occasion for recognition of the privilege is particularly compelling in the circumstances of this case. In designating petitioner as a Communist organization, the Attorney General was acting as the agent and *alter ego* of the President in the exercise of primary executive power. Accordingly, his act was a political act and beyond the control of any other branch of the Government except in the mode prescribed by the Constitution through impeachment. It is significant in this connection that petitioner is

asking the Court to restrain a Cabinet officer from reporting to the President, or to the agency designated by him, the result of an investigation undertaken pursuant to the President's order, on the ground that that result is erroneous. The President's power to require the opinion of the heads of the executive departments is an integral incident of his office specifically provided for in the Constitution. Article II, Section 2. The Attorney General having been directed by the President to determine and publish the list had the clear duty under the Constitution to comply. The determinations made by the Attorney General in fulfillment of that duty are essentially political, not judicial in nature. They are decisions of a kind for which the judiciary neither has the responsibility nor the facilities to review. Cf. *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103.

## ARGUMENT

### INTRODUCTORY STATEMENT

This is one of a group of cases which attack the validity of Executive Order 9835 establishing the government employee loyalty program. Basic challenges to that program made by an affected employee and raising central procedural and substantive issues are presently before the Court in *Bailey* v. *Richardson* et al., No. 49, this Term.[2] Respondents' brief in the *Bailey* case

[2] The same questions are presented by the petition for certiorari in *Washington et al.* v. *McGrath*, No. 229, this Term.

fully demonstrates the occasion for, and the validity of, the loyalty order. The present case, however, raises a threshhold question of standing to sue, in that no government employee is a party to this proceeding, and petitioner does not even purport to represent any such employee.[3]

The procedures prescribed by Executive Order 9835 in passing on government employee loyalty are fully described in the brief for respondents in No. 49, pp. 14–24. The standard prescribed by the Order for denying employment is that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Part V, Section 1). Among the activities and associations which "may be considered" in connection with the determination of disloyalty is (Part V, Section 2 (f)):

> Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution

[3] *National Council of American-Soviet Friendship, Inc., et al.* v. *McGrath*, No. 7, this Term, certiorari granted on May 15, 1950, and *International Workers Order* v. *McGrath*, No. 71, this Term, are similar to the present case.

> of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

The Department of Justice is directed currently to furnish to the Loyalty Review Board, for dissemination to all departments and agencies, the name of each organization so designated by the Attorney General (Part III, Section 3).

In accordance with the provisions of the Order, the Attorney General, after appropriate investigation and determination (Brief for Respondents in No. 49, p. 23), designated petitioner a Communist organization and notified the Loyalty Review Board of that finding. And, in accordance with the provisions of the Order, the Loyalty Review Board transmitted that finding to the various departments and agencies.

It is this legislation and publication which petitioner attacks. The complaint consists of various allegations as to impairments of the organization's fund-raising activities, claimed to have resulted from the public disparagement caused by the designation and publication (*supra*, p. 5). Petitioner essentially contends that the President lacked the power to require the designation of organizations for use in passing upon employee loyalty, praying that respondents be enjoined from "* * * designating, declaring, circulating or publicizing" petitioner's name as a designated organization, that the designation be publicly retracted, and that respondents be directed to take no action on the basis of the in-

clusion of petitioner's name in the designated list (R. 8–9). To this specific challenge to one portion of the loyalty program, petitioner adds a generalized charge that the entire Executive Order and Section 9A of the Hatch Act "as applied" are invalid and prays for a declaration to this effect (R. 7, 8).[4]

The nature of the prayer and of the arguments advanced by petitioner emphasize that petitioner's quarrel with the Government is essentially political in nature. Much of its argument is addressed to the wisdom of the loyalty program and to assertion that it was politically motivated. (E. g. Pet. 36–49, incorporated by reference in its Brief at p. 38.) To strike down the program as an entirety, not merely to test the validity of a particular aspect of its administration, seems to be the purpose of the suit. Petitioner pre-

[4] The instant case presents no occasion for consideration of the validity of Section 9A of the Hatch Act. The Attorney General's designation of petitioner as a subversive and communist organization is not a designation under section 9A which, by its terms, applies only to an "organization which advocates the overthrow of our constitutional form of government in the United States." Organizations coming within the purview of Section 9A have been separately listed by the Attorney General as organizations which seek "to alter the form of government of the United States by unconstitutional means," and petitioner is not so designated. See Appendix to Brief for Respondents in No. 49, p. 145; Directives of the Loyalty Review Board, 5 CFR (1949 ed.) 210.11 (b) (6), 220.2 (a) (6), 230.2 (a) (6). It is plain that Section 9A in no way, directly or indirectly, interferes with petitioner's activities.

mises its attack on the contention that its designation as Communist by the Attorney General is, whether true or not, an abridgement of its First Amendment freedoms (Br. for Pet. pp. 38–48). To buttress this main contention, petitioner further asserts that the Executive Order is void under the Ninth and Tenth Amendments.[5] As a secondary constitutional argument, petitioner urges that the loyalty program fails to meet due process requirements under the Fifth Amendment (Br. for Pet. pp. 48–56). We submit that the court below properly held that these contentions fail to present a justiciable constitutional controversy.

Constitutional questions aside, petitioner seeks to justify a claim to equitable intervention by reference to the general law of defamation. As we show, *infra*, pp. 35–50, official utterances of the type here involved are absolutely privileged. This facet of petitioner's argument, accordingly, presents no claim upon which relief can be granted.

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[5] It is difficult to perceive that reference to these constitutional provisions adds anything to petitioner's case. The Ninth and Tenth Amendments do not create rights in the individual but impose duties owed to the body politic. In contending, therefore, that the Executive Order is, under the Ninth and Tenth Amendments, ultra vires of the power of the Executive, petitioner merely reasserts, in different form, its basic position that its First Amendment rights have been abridged. Accordingly no further reference will be made herein to the Ninth and Tenth Amendments.

# I

## THE COMPLAINT DOES NOT PRESENT A JUSTICIABLE CONSTITUTIONAL CONTROVERSY

"The most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." Frankfurter, J., concurring in *United States* v. *Lovett*, 328 U. S. 308, 318 at 320. "For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89. "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241.[6] The requirement, for justiciability, that a case or controversy be presented, has been uniformly applied in suits against government officers, complaining of unlawful conduct by the officers. In such cases, the Court has found jurisdiction absent unless it be shown that the plaintiff "has sustained or is immediately in danger

[6] That the Federal Declaratory Judgment Act does not enlarge the basic jurisdiction of the courts and does not create controversies where none existed before has been affirmed many times by this Court. *United Public Workers* v. *Mitchell*, *supra*; *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461; *Colegrove* v. *Green*, 328 U. S. 549, 551–552; *Coffman* v. *Breeze Corps.*, 323 U. S. 316, 324; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240; *United States* v. *West Virginia*, 295 U. S. 463, 475; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 262.

of sustaining some direct injury" to a private substantive legally protected right. *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 137–138.[7] Here, there is no such showing.[8]

A. THE ATTORNEY GENERAL'S DESIGNATION OF PETITIONER AS A COMMUNIST ORGANIZATION, FOR THE PURPOSE OF THE LOYALTY PROGRAM, DOES NOT INVADE OR ABRIDGE PETITIONER'S FIRST AMENDMENT RIGHTS

Examination of the specific injuries alleged (*supra*, p. 5) reveals clearly that petitioner lacks standing to assert that the loyalty program is repugnant to the First Amendment.

[7] Thus where the legal injury threatened is the indirect injury which may result to every stockholder from injury to the corporation (*Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, 487; *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432); or the indirect injury to a consumer arising out of the fixing of minimum prices under an alleged unconstitutional statute (*Atlanta* v. *Ickes*, 308 U. S. 515); or the indirect injury to a federal taxpayer or citizen resulting from allegedly unconstitutional or unlawful federal action (*Frothingham* v. *Mellon*, 262 U. S. 447; *Fairchild* v. *Hughes*, 258 U. S. 126; *Frahn* v. *Tennessee Valley Authority*, 41 F. Supp. 83 (N. D. Ala.)); or the indirect injury to particular silver producers because of the failure of the Secretary of the Treasury to purchase silver under the Pitman Act, 40 Stat. 35 (*United States ex rel. American Silver Producers Assn.* v. *Mellon*, 32 F. 2d 415 (C. A. D. C.), certiorari denied, 280 U. S. 561), the suit must fail for want of a justiciable controversy.

[8] Cf. *Thompson* v. *Wallin*, 95 N. Y. S. 2d 784 (App. Div. 3rd Dept.) (Feinberg Law); *Hammond* v. *Lancaster*, 71 A. 2d 474 and *Hammond* v. *Frankfeld*, 71 A. 2d 482 (Md.) (Ober Law).

These allegations amount to no more than that petitioner's fund raising abilities have been impaired as the result of unfavorable public opinion. Admittedly, public opinion was influenced by publication of the result of the Attorney General's investigation. But such unfavorable publicity has no legally operative effect upon petitioner's constitutional rights. The injuries of which petitioner complains arise from the force of public opinion and not from the direct action of respondents. The Hatch Act, the Executive Order, and the Attorney General's list are intended solely to secure the employment in the Federal Government of those loyal to our constitutional form of government. Neither in their genesis, on their face, nor in their operation, do they purport to control petitioner's activities or to impose any legal consequences upon such activities. And in so far as members of the public may have refused to participate in, or aid, petitioner's fund raising activities, by declining to make contributions, declining to speak or entertain at petitioner's fund raising affairs, or declining to make facilities available to petitioner for meetings, such action has not been the result of any direction, requirement, or even suggestion on the part of respondents.[9] Petitioner remains

[9] It is a complete distortion of the intent and purpose of the Attorney General's list to conceive of it as a "blacklist" calculated to injure petitioner by harassment and vilification. The list of designated organizations was furnished the

perfectly free to collect and disburse funds in the same manner as it has always done; it is free to conduct meetings and other functions, to express itself freely through its officers and members; it is not prevented in any fashion from uttering, or publishing and distributing its beliefs.

We submit that the indirect consequences of public disclosure are not within the purview of the First Amendment. Such indirect consequences may result from any public investigation by Congress or the Executive. The First Amendment does not provide that Congress or the Executive may not inform the public; it provides that "Congress shall make no law * * * abridging the freedom of speech or of the press." It was not intended to protect persons against unfavorable public opinion, even though such opinion may be stimulated by disclosures made by or to an investigating body.[10] Petitioner points

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Loyalty Review Board only by way of information and advice. That is made clear by the terms of the Executive Order and letter of the Attorney General (Appendix to Brief for Respondents in No. 49, pp. 137–138).

[10] The incongruity of petitioner's argument that publicity alone which exposes persons to adverse public sentiment unconstitutionally restrains freedom of speech is demonstrated by the inapplicability of the "clear and present danger" test to the power of investigation. Although that test may govern the power of Congress to regulate speech, it cannot limit the power of Congress or the Executive to inquire, and concomitantly, to publicize their findings. For Congress would be unable intelligently to determine whether or not there was a clear and present danger warranting legislation unless it could obtain evidence as to the circumstances in which there

to no case, and we do not believe that any exists, that holds that executive or legislative action which neither orders someone to do or refrain from doing something nor withholds any privilege or license but merely publicizes the result of investigation is an unconstitutional restraint upon First Amendment Rights."

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was no such danger as well as in which there was. Cf. *Barsky* v. *United States*, 167 F. 2d 241, 246–247 (C. A. D. C.), certiorari denied, 334 U. S. 843.

[11] Petitioner in No. 7, *National Council of American-Soviet Friendship, Inc.* v. *McGrath*, cites *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, and *Thomas* v. *Collins*, 323 U. S. 516, for the proposition that judicial relief is available where "the governmental action merely exposed persons to conduct or attitudes of other persons which might have a restraining effect on the liberties of the complaining parties" (Br. for Pet. pp. 18–19). As we read the cases, it is clear that the standing of the petitioners therein was not thus grounded. In the *McCollum* case, petitioner predicated her standing to sue on the grounds that she was a local taxpayer and that the "released-time" program of Illinois subjected her child to humiliation as a non-conformist. The Court held that petitioner had standing as a local taxpayer and apparently did not reach the sufficiency of her other contention. 333 U. S. at 206, citing *Coleman* v. *Miller*, 307 U. S. 433, 443, 445, 464. But see *Jackson*, J., concurring, 333 U. S. at 232–233. On the merits, the Court concluded that the "released time" program was void as "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *Id.*, at 210. In *Thomas* v. *Collins*, there was no question that petitioner had standing since he had been sentenced to a fine and imprisonment for contempt of a court order issued under the provisions of a state statute. Further, this Court's opinion nowhere suggests that the statute in question, which required labor union organizers to register with the Secretary of State before soliciting members, was void because it subjected petitioner to unfavorable public

A contrary philosophy, sanctioning investigation and correlative disclosure in aid of legislation or law enforcement, is embedded in our system of government.[12] No change or occasion for change in this philosophy is apparent. Rather, current American political belief, whether liberal or conservative, continues to support full freedom of investigation and disclosure.[13] Current

opinion. In fact, the audience addressed by petitioner was fully aware of his union position and sympathetic toward the arguments advanced in his speech.

[12] Thus statutory provisions frequently require disclosure. *E. g.*, newspapers using the mails, 37 Stat. 533, 39 U. S. C. 233; Securities Act of 1933, 48 Stat. 74, 15 U. S. C. 77a; Food, Drug, and Cosmetic Act, 52 Stat. 1040, 1041, 21 U. S. C. 321; Alien Registration Act, 54 Stat. 673, 8 U. S. C. 452; registration of foreign agents, 52 Stat. 631, 22 U. S. C. 611; registration of lobbyists, 60 Stat. 839, 2 U. S. C. 261; oath of allegiance as condition on privilege of suit against United States in Court of Claims, R. S. 1072, 28 U. S. C. 265; cf. *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419; *Bryant* v. *Zimmerman*, 278 U. S. 63, 72; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288.

[13] For example, the principle of disclosure has been advanced by persons most zealous to protect civil liberties as the appropriate way of preserving those liberties. The Report of the President's Committee on Civil Rights (*To Secure These Rights*, U. S. Govt. Printing Office, 1947) concluded that (pp. 52, 53):

"The principle of disclosure is, we believe, the appropriate way to deal with those who would subvert our democracy by revolution or by encouraging disunity and destroying the civil rights of some groups.

* * * * *

"* * * The Federal government * * * ought to provide a source of reference where private citizens and groups may find accurate information about the activities,

judicial decisions reaffirm this view by declining to recognize First Amendment claims to inviolability by individuals or groups as a block to investigation and disclosure in the field of national security. Cf. *Lawson* v. *United States* and *Trumbo* v. *United States*, 176 F. 2d 49 (C. A. D. C.), certiorari denied, 339 U. S. 934, rehearing denied, 339 U. S. 972; *Eisler* v. *United States*, 170 F. 2d 273 (C. A. D. C.), certiorari granted, 335 U. S. 857, cause removed from docket until further order of the Court, 338 U. S. 189, writ dismissed, 338 U. S. 883; *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Josephson*, 165 F. 2d 82 (C. A. 2), certiorari denied, 333 U. S. 838, rehearing denied, 333 U. S. 858.

In this connection it is appropriate to state to the Court our position on the validity of petitioner's First Amendment contention. The decisive issue here is standing to sue and we believe that petitioner plainly fails to present a justiciable controversy. However, if it be assumed *arguendo* that adverse public opinion constitutes a sufficiently direct "discouragement" to give petitioner standing in Court, we submit that there is no improper invasion of any of petitioner's First Amendment freedoms.

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sponsorship, and background of those who are active in the market place of public opinion.

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As this Court recently pointed out in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 399, "when particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." In the instant case, as in the *Douds* case, "we have here no statute which is either frankly aimed at the suppression of dangerous ideas nor one which, although ostensibly aimed at the regulation of conduct, may actually 'be made the instrument of arbitrary suppression of free expression of views.' * * * There are involved here none of the elements of censorship or prohibition of the dissemination of information * * *" (*Id.* at 402–403). The purpose of the Executive Order is to insure the loyalty of those in the Government service. The substantial necessity, in the public interest, for the issuance of the loyalty order, demonstrated in the respondents' brief in the *Bailey* case, No. 49, pp. 24–56, 79–99, serves to sustain the validity of the executive action even as to those directly affected. What we have said in that brief substantially answers petitioner's contentions here.

We need make only one further comment. The challenge here runs merely to one feature of the

administration of the program, one which has no compelling or controlling effect either on government employees whose loyalty is being examined or on the organizations designated for consideration in that process. Loyalty or disloyalty is a state of mind. Assessment of loyalty or disloyalty must be aided by examination of overt acts and objective facts in so far as such facts are obtainable. In addition, determinations as to loyalty must be inferred from words and conduct. It seems obvious that an essential step in the process of screening government employees is the ascertainment of the character of the organizations with which an employee is affiliated, if any, and the nature and extent of his affiliation. Centralization of the examination into the character of organizations for the purpose of the loyalty program by imposing the duty of investigation and designation upon the Attorney General not only locates the inquiry in the hands of the officer best equipped to deal with it but also serves to avoid the discrimination and unevenness that might result if separate loyalty boards, existing in the several departments and agencies, were faced with the necessity of making the determination independently. Accordingly we submit that the designation of subversive organizations by the Attorney General for the purposes of the loyalty program could not be successfully challenged under the First Amendment.

B. THE ATTORNEY GENERAL'S DESIGNATION OF PETITIONER AS A COMMUNIST ORGANIZATION, FOR THE PURPOSE OF THE LOYALTY PROGRAM, NEITHER FIXES PETITIONER'S STATUS NOR CONTROLS PETITIONER'S ACTIVITIES SO AS TO CREATE A JUSTICIABLE CONTROVERSY

Petitioner argues, however, that more than publicity is here involved. It asserts that the Attorney General's designation definitively fixed its status for all purposes under the Executive Order and hence is a regulation directly affecting it whose validity it has standing to review. We do not dispute that a determination of status which unconditionally subjects a person to legal consequences may give rise to a justiciable claim by such person. And recognizable derivative claims may also exist in one who has been deprived of an advantageous legal relationship with the person or group directly controlled. But we believe that petitioner cannot qualify in either category so as to attain standing to challenge the administration of the loyalty order.

1. *Neither petitioner's action nor status are directly affected by the Attorney General's designation*

The challenged executive order is in no way designed to control petitioner's activities. Neither the statute, the Executive Order, nor the Attorney General's list require the resignation of petitioner's members nor do they bar the entry of new members. They contain no directive to other federal, state, or municipal officials which in any way subjects petitioner to the contingency of future administrative action. They subject

petitioner to no criminal or civil penalties, either immediate or postponed." In brief, petitioner's own existing and future legal status remains unchanged.

Thus, the complaint alleges that, as a result of the Attorney General's designation of petitioner as a communist organization, the Bureau of Internal Revenue has deprived it of its status as a tax exempt organization (R. 6). This allegation has no basis in fact. As we have already pointed out, petitioner's legal status is unaltered by the Hatch Act, the Executive Order and the Attorney General's list. The tax status of petitioner is determined solely by Section 101 (6) of the Internal Revenue Code, 26 U. S. C. 101 (6), which grants an exemption to charitable corporations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." If petitioner were previously entitled to an exemption, it is still so entitled. Petitioner's quarrel is with the Commissioner of Internal Revenue, not with respondents who exercise no functions under the Internal Revenue Code in this connection; its remedy lies in a proceeding against the Commissioner in a proper case under the Code, not against respondents. So far as the record shows,

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[14] Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177; *La Crosse Tel. Corp.* v. *Wis. Employment Relations Board*, 336 U. S. 18, 24; *Waite* v. *Macy*, 246 U. S. 606.

petitioner has not seen fit to avail itself of the legal remedy thus afforded. Moreover, since such a legal remedy is available, it clearly has shown no occasion for equitable intervention.

For like reasons, petitioner's allegation that it has been refused licenses to solicit funds fails to establish the existence of a present controversy with these respondents (R. 6). The grant of such licenses by states or municipalities depends upon the laws or ordinances of those bodies. In no way does the statute, the Executive Order, or the Attorney General's list purport to define petitioner's status under those laws or ordinances. Again, petitioner's quarrel is with those local officials, not respondents, and it is not shown that petitioner has taken any legal action before them to vindicate its reputation or its rights.

Since the executive action in question does not unconditionally subject petitioner to legal consequences, either embodied in statute or regulation, no occasion for judicial action is presented.[15] The controlling principle is familiar.

[15] In this connection, it is instructive to compare the executive action here challenged with the provisions of the Internal Security Act, P. L. 831, 81st Cong., 2d sess. Unlike the Attorney General's designation of organizations for the purposes of the loyalty program, P. L. 831 does impose unconditional legal consequences on those organizations found to come within its terms. For example, Communist organizations and their members are required to register with the Attorney General, civil and criminal penalties being imposed for failure to register. Registration unconditionally

*United States* v. *Los Angeles & St. L. R. Co.*, 273 U. S. 299; *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103; *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591, 619; *United States* v. *Atlanta B. & C. R. Co.*, 282 U. S. 522, 527, *Ex parte Williams*, 277 U. S. 267, 271; *Penna. Federation* v. *P. R. R. Co.*, 267 U. S. 203, 215; *Penna. R. R.* v. *Labor Board*, 261 U. S. 72, 85; *Standard Scale Co.* v. *Farrell*, 249 U. S. 571, 574; *Employers Group, Etc.* v. *National War Labor Board*, 143 F. 2d 145, 147 (C. A. D. C.), certiorari denied, 323 U. S. 735; *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (C. A. D. C.), certiorari denied, 323 U. S. 774; *National War Labor Board* v. *United States Gypsum Co.*, 145 F. 2d 97 (C. A. D. C.), certiorari denied, 324 U. S. 856, rehearing denied, 324 U. S. 890.

Petitioner attempts to avoid the impact of these decisions by urging that they be given an extremely limited reading convenient to its purpose here. Singling out the *Los Angeles* case, for example, petitioner argues that that decision be construed to mean only that efforts to obtain judicial review are premature if they challenge an interim step in an ultimately reviewable ad-

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results in the loss of income tax exemption to organizations and in ineligibility of its members for employment by the Federal Government and defense plants. The Act provides for a full administrative hearing and judicial review of the question whether a particular organization comes within its purview.

ministrative proceeding. Concededly, the *Los Angeles* case can be, and often is, cited in the manner suggested. However, that case, as well as the other cases cited, clearly stands for the much broader proposition that the jurisdictional requirement that a case or controversy be presented is not met where the challenged governmental activity has no legally compulsive effect on the one who seeks to attack it. Cf. *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. at 112–113. This Court has observed that the principle of non-justiciability of advisory opinions or investigative findings, given classic formulation by Mr. Justice Brandeis in the *Los Angeles* case (273 U. S. at 309–310), is not merely a matter of deference to the special functions of administrative agencies but is rooted in, and required by, Article III, Sec. 2 of the Constitution. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 131.

2. *Since the Attorney General's designation is not controlling in passing upon the loyalty of government employees, petitioner lacks derivative standing*

Petitioner's case is not improved by considering its standing as derivative. To attain derivative standing, petitioner contends that the Attorney General's designation irrevocably fixes its status for administrative proceedings with regard to the eligibility for Federal employment of its members. Concededly, the Attorney General's designation thus fixes its status in the sense that designation is not subject to reexamination

in particular loyalty proceedings. But, as analysis of the cases relied on by petitioner reveals, this does not suffice to give standing to petitioner. Petitioner must also show that the determination of such status unconditionally results in the ineligibility for Federal employment of its members and thus directly controls its relationships with such members. Examination of the facts evidences that this essential element of petitioner's claim to derivative standing is entirely missing.

a. *The Rationale of Petitioner's Cases.*—Petitioner places principal reliance on such cases as *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18; *Columbia Broadcasting System* v. *United States,* 316 U. S. 407; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Buchanan* v. *Warley,* 245 U. S. 60; and *Truax* v. *Raich,* 239 U. S. 33. In each of these cases, the challenged statute or regulation allegedly invaded a legally protected right of the individuals or groups to whom it was directly addressed, thus creating a justiciable controversy as to them. Since the coercive effect of the statute or regulation upon those individuals or groups was such that it necessarily resulted in the regulation of the advantageous relationships between those individuals or groups and complainant to complainant's detriment, a justiciable controversy likewise existed as to complainant.

Thus, in *Pierce* v. *Society of Sisters, supra,* a private school was permitted to test the validity of a statute which restrained the liberty of par-

ents and destroyed its property rights by requiring parents to send their children to public schools. In *Truax* v. *Raich, supra,* an alien was able to challenge a statute which restrained the liberty of his employer and conditioned his right to work by requiring the employment of not less than a stated percentage of native citizens or qualified electors. In *Buchanan* v. *Warley, supra,* a white person whose property rights were restricted by an ordinance which forbade the occupancy of certain areas by Negroes was permitted to attack the constitutionality of that ordinance in a suit for specific performance of a contract to sell his house to a Negro. And in *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board, supra,* an employer was permitted to attack an order which designated a bargaining agent and subjected the employer to sanctions for failure to comply with the certification.

Similarly, in the *Columbia Broadcasting System* case, upon which petitioner primarily relies, the Columbia System was held to have standing to challenge a regulation of the Federal Communication Commission which, although directed at subsidiary radio stations, altered the status of the Columbia System's contracts with those stations. The regulations prohibited certain provisions of network-affiliation contracts and required the Commission unconditionally to reject, and authorize it to cancel, licenses of affiliated stations on the grounds specified in the regula-

tions. *Id.* at 418. The Court pointed out that the regulations operated to control future administrative action and determined in advance the rights of those affected by it, the only question for later determination in any given case being whether an affiliated station's contract with a network is within the terms of the regulation. *Id.* at 420.

b. *Petitioner's cases are inapplicable here.*—In the instant case, however, the designation of petitioner as a Communist organization creates no justiciable controversy between the Government and those federal employees who may be members of petitioner. The Executive Order does not require such federal employees to disassociate themselves from petitioner's activities nor does it bar other federal employees from becoming members. In short, the fixing of petitioner's status as Communist for the purposes of the loyalty program does not result in the ineligibility for federal employment of its members. We do not have here the direct and near-automatic disruption of relationships which, in the *Columbia Broadcasting System* case, led the Court, in order to prevent the complete destruction of major economic interests by alleged invalid present regulation, to consider a challenge to government action on the part of one to whom that action was not directed.[16]

[16] The complaint contains no allegation as to the number or proportion of petitioner's membership which consists of federal employees, or of the extent of the claimed injury attributable to the alleged dropping out of federal employees.

As already noted, the Attorney General's list merely furnishes information to the various departments and agencies. The standard for denying Federal employment is that "on *all* the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." Concerning the evidentiary weight to be given the designation of organizations by the Attorney General, the Loyalty Review Board has specifically stated that (5 C. F. R. (1949 ed.) pp. 195–196, 200):

* * * * *

> The probative value of evidence of past or present membership in, affiliation with or sympathetic association with, any one or more of the organizations so designated by the Attorney General can be fairly evaluated only after determining; so far as possible, the character of the organization, the period, nature and duration of the association, whether the employee or applicant was aware of the subversive character of the organization at the time of such association, and the nature of his activities in connection with such organization.
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> * * * * *
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> In connection with the designation of these organizations, the Attorney General has pointed out, as the President had done previously, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with, or

> sympathetic association with, any organization designated is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. "Guilt by association" has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide.
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> * * * * *

Accordingly, the Attorney General's list of designated organizations does not establish controlling criteria for determinations of disloyalty. Participation in the activities of a designated organization is "simply one piece of evidence which may or may not be helpful" in arriving at a conclusion based on all the evidence that reasonable grounds exist for belief that the employee involved is disloyal. It is apparent, therefore, that, since petitioner's designation by the Attorney General does not, as to any of its members who may be federal employees, impose any obligation, deny any right, or determine status, such employees have no standing to challenge that designation. Since the designation does not result in the unconditional regulation of petitioner's relationships with federal employees, it follows *a fortiori* that petitioner likewise has no standing to challenge the designation.

Finally, it should be noted that, in the cases upon which petitioner relies, the challenged governmental action was the exercise of regulatory power over private business. Here, on the other hand, the Executive Order, and the action taken pursuant to it, relates solely to the internal management of the Government. The President did no more than prescribe conditions to govern executive agencies in the selection of their employees, and instruct the Attorney General to advise them with respect thereto. To do so, within the limits of his constitutional and statutory authority, was the right and duty of the Chief Executive. The employment and discharge of its civil servants, and the establishment of terms and conditions which must be met by employees or applicants for employment, are internal administrative matters concerning which the United States is free to act as it pleases, without judicial compulsion or restraint at the insistence of an outsider such as petitioner. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128; 129. And see Brief for Respondents, *Bailey* v. *Richardson*, No. 49.

## II

### PETITIONER'S ALLEGATION THAT IT HAS BEEN DEFAMED DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

As we have shown, there is no basis for petitioner's assertion that respondents' action is, as to petitioner, repugnant to the First and Fifth

Amendments. The gravamen of the complaint thus resolves itself to the alleged damage to "the favorable reputation, moral support, and good will of the American people enjoyed by plaintiff" (R. 4).[17] Relief in the suit for defamation thus pleaded is barred, however, by a long recognized privilege, particularly applicable in the circumstances of this case.

A. OFFICIAL STATEMENTS ARE ABSOLUTELY PRIVILEGED

As petitioner concedes (Br. for Pet. 33–35), it is well settled that utterances of public officials in the exercise of official duties are *absolutely* privileged, irrespective even of a claim of malicious motivation.[18] *Spalding* v. *Vilas,* 161 U. S. 483; *Jones* v. *Kennedy,* 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Glass* v. *Ickes,* 117 F. 2d 273 (C. A. D. C.), certiorari denied, 311 U. S. 718; *Smith* v. *O'Brien,* 88 F. 2d 769 (C. A. D. C.); *United States* v. *Brunswick,* 69 F. 2d 383 (C. A. D. C.); *Mellon* v. *Brewer,* 18 F. 2d 168 (C. A. D. C.), certiorari denied, 275 U. S. 530; *Farr* v. *Valentine,* 38 App. D. C. 413; *De Arnaud* v. *Ainsworth,* 24 App. D. C. 167, writ

[17] Although petitioner admits that it "cannot sue in libel" (Br. p. 32), its suit is clearly an attempt to do just that. Thus it argues that if its designation as subversive had been uttered by a private person it would be actionable, and hence it should be when uttered by the Attorney General (Br. pp. 14–15).

[18] There is no allegation of malice herein.

of error dismissed, 199 U. S. 616.[19] The privilege is applicable not only to communications between Government officials but also to communications released generally to the press. *Spalding* v. *Vilas, supra; Glass* v. *Ickes, supra; Mellon* v. *Brewer, supra.*

To come within the privilege, "it is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute * * *; or even that they should be specifically directed or requested by a superior officer. * * * It is sufficient if they are done by an officer *'in relation* to matters committed by law to his control or supervision.' * * *; or that they have '*more or less connection with* the general matters committed by law to his control or supervision.' * * *." *Cooper* v. *O'Connor,* 99 F. 2d at 139, repeated in *Glass* v. *Ickes, supra,* at 278.

[19] Cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; *Dodez* v. *Weygandt*, 173 F. 2d 965 (C. A. 6); *Gibson* v. *Reynolds*, 172 F. 2d 95 (C. A. 8), certiorari denied, 337 U. S. 925; *Laughlin* v. *Rosenman*, 163 F. 2d 838 (C. A. D. C.); *Adams* v. *Home Owners' Loan Corp.*, 107 F. 2d 139 (C. A. 8); *Cooper* v. *O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; *Phelps* v. *Dawson*, 97 F. 2d 339 (C. A. 8); *Lang* v. *Wood*, 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; *Standard Nut Margarine Co.* v. *Mellon*, 72 F. 2d 557 (C. A. D. C.), certiorari denied, 293 U. S. 605; *Brown* v. *Rudolph*, 25 F. 2d 540 (C. A. D. C.), certiorari denied, 277 U. S. 605; *Yaselli* v. *Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 603; See American Law Institute, *Restatement, Torts* § 591.

Thus, there can be no question here that the alleged defamation was privileged; the designation of petitioner as a communist organization by the Attorney General was made in accordance with a duty expressly imposed by the President.

Petitioner's contention that there is no privilege if the authority pursuant to which respondents acted is unconstitutional overlooks the important principles of public policy upon which the privilege is grounded. "The public interest requires that persons occupying such important positions * * * should speak and act freely and fearlessly in the discharge of their important official functions" (*Yaselli* v. *Goff, supra,* at 406, affirmed, 275 U. S. 603, repeated in *Gregoire* v. *Biddle, supra,* at 580, certiorari denied, 339 U. S. 949), and their privilege cannot be made to depend upon the ultimate outcome of a judicial determination of the validity of the particular authority under which they act or speak. "Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service." (*De Arnaud* v. *Ainsworth, supra,* at 178, repeated in *Cooper* v. *O'Connor, supra,* at 141–142).

Nor is this privilege limited to actions for money damages, as petitioner asserts (Br. for Pet. 33–35). *United States* v. *Los Angeles & St. L. R. Co., supra; Hearst Radio* v. *Federal Com-*

*munications Commission*, 167 F. 2d 225 (C. A. D. C.); *Tinkoff* v. *Campell*, 86 F. Supp. 331 (N. D. Ill.). In the *Los Angeles* case, a railroad company, seeking to suppress a final valuation report of the Interstate Commerce Commission, contended that the suit should be entertained under the general equity power of the Court. It was urged "that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public." 273 U. S. at 314. Holding that "No basis is laid for relief under the general equity powers," the Court declared that "Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." 273 U. S. at 314–315.[20]

Petitioner's argument that a cause of action in equity has been stated because there is no adequate remedy at law misconceives the nature of concurrent equity jurisdiction. Where equity jurisdiction is concurrent only, as here, it is a

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[20] *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56; *Bank of America National Trust & Savings Association* v. *Douglas*, 105 F. 2d 100 (C. A. D. C.); *American Sumatra Tobacco Corp.* v. *Securities & Exchange Commission*, 93 F. 2d 236 (C. A. D. C.) do not hold to the contrary. In those cases, the issue was not whether equity would enjoin a defamation but whether equitable relief was available to enjoin the public disclosure of confidential information supplied by the complainant in violation of statutory provision assertedly forbidding such disclosure.

necessary condition for the exercise of such jurisdiction that a cause of action exist at law for which the law does not provide an adequate remedy. Here, it is plain that that condition is not met. Petitioner's complaint is not that there is no adequate remedy at law but that the law does not recognize that any of petitioner's rights have been infringed, *i. e.*, that there is no cause of action at law. "The existence of a privilege whether consensual or irrespective of the other's consent prevents an act or omission which would otherwise be tortious from so being and, therefore, protects the actor from even being subject to liability." American Law Institute, *Restatement, Torts*, § 10, Comment a. Since there is no tort at law, there is no basis for concurrent equity jurisdiction.

As a matter of policy, we can perceive no justification for the contention that official privilege from suit for defamation be confined to suits at law. The occasion for recognition of the privilege is as great, if not greater, where the attack is brought in equity. The foundation of the doctrine of the privilege is that the interest of the individual must give way to the public interest in unfettered expression of executive opinion. It is apparent that, whatever the form of judicial review, the heavy burden upon government officials in terms of time and manpower necessary to a defense of their public statements would place a serious restraint upon their ex-

pression of executive opinion. And there can be no question that the threat of prosecution for contempt for non-compliance with an injunction is as effective a deterrent to the exercise of their public functions as the threat of money damages at law. Finally, it is obvious that effective government can be far more seriously impaired by a remedy which runs to official functions as well as to the persons of public officials. Cf. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. As this Court has recognized, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Yakus* v. *United States*, 321 U. S. 414, 441.

B. THE OCCASION FOR RECOGNITION OF THE PRIVILEGE IS PARTICULARLY COMPELLING HERE

The application of these well-settled principles is here reinforced by fundamental doctrine which has been undisputed since the beginning of the Republic. No argument is necessary to demonstrate that the present time of tension and danger demands the utmost vigor and vigilance on the part of the President to take action which he deems required in the interest of national safety. See brief for respondents, *Bailey* v. *Richardson*, No. 49, pp. 24–57. That protection against infiltration by adherents of Communism forms a

significant part of the national security problem has been tragically demonstrated again and again in recent history. Cf. *United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2).

The constitutional basis for the President's ability to act in this sphere lies in the vesting in his office of all executive power and in his duty to execute the laws. Article II, Sections 1, 3. The power is one which far transcends specific grants by Act of Congress. *Myers* v. *United States*, 272 U. S. 52, 151–164. The duty of the President to execute the laws includes "the rights, duties and obligations growing out of the Constitution itself * * * and all the protection implied by the nature of the government under the Constitution." *In re Neagle*, 135 U. S. 1, 64.

That this basic Presidential power fully validates the loyalty program is demonstrated by the brief for respondents in *Bailey* v. *Richardson*, No. 49, pp. 59–99. Insofar as the specific aspect of that program here involved—the Attorney General's designation of subversive organizations—is concerned, we have already shown that screening of loyalty of government employees involves an assessment of state of mind, a process which may reasonably include consideration of associations. *Supra*, p. 11. Moreover, we think it axiomatic that the broad Presidential power to execute the laws must always include the right to

speak forth freely to the nation.[21] Every society possesses the power to defend itself and it is the President's duty and his right to inform the people of those groups whose activities are, in his judgment, inimical to the public welfare. His duty to inform the nation is particularly compelling when, as here, organizations are, in his opinion, engaging in activities that constitute a threat to our democratic process and form of government. To assert that the President cannot do so is to turn the Constitution upon itself, to strip the Government of the power of self-preservation and the means of communicating with its citizens. As Circuit Judge Chase has stated in a similar context (*United States* v. *Josephson*, 165 F. 2d 82, at 88–89 (C. A. 2), certiorari denied, 333 U. S. 838, rehearing denied, 333 U. S. 858):

> * * * One need only recall the activities of the so-called fifth columns in various countries both before and during the late war to realize that the United States should be alert to discover and deal with the seeds of revolution within itself. And if there be any doubts on the score of the power and duty of the Government and Congress to do so, they may be resolved when it is remembered that one of the very purposes of the Constitution itself was to protect the

[21] In this connection, it is pertinent to observe that the Constitution specifically requires of the President that "He shall from time to time give to the Congress Information of the State of the Union * * *." Article II, Section 3.

> country against danger from within as well as from without. See The Federalist, Nos. II–X. Surely, matters which potentially affect the very survival of our Government are by no means the purely personal concern of anyone.

In exercising this broad power to inform the nation of potential threats to its existence, the President is immune from judicial restraint. Cf. *Mississippi* v. *Johnson,* 4 Wall. 475. It is true, as asserted by petitioner, that this power is subject to abuse. That is a risk inherent in the Constitution, a risk calculated and advisedly taken by our founding fathers.

> * * * Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometime interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. (The Federalist, No. LXX.)
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> * * * it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision (*Id.,* No. LXXI).

Should the President overstep himself, there is opportunity to replace him by the elective process,

or he may be impeached. Petitioner complains that such recourse is inadequate; the short answer is that the Constitution permits no more.

We think it plain that the President has this power to designate those who, in his judgment, are hostile to the national welfare and equally plain that he may exercise it through the head of an executive department. Cf. *Williams* v. *United States,* 1 How. 290; *Wilcox* v. *Jackson,* 13 Pet. 498; *Myers* v. *United States, supra,* at 117. That the President utilizes a Cabinet officer as his agent does not alter the nature of the act so as to attach different consequences as to judicial review. Where the duties are political duties and the officials are acting as the agent of the President, the actions of those executive heads are beyond the control of any other branch of the Government except in the mode prescribed by the Constitution through impeachment. *Kendall* v. *United States,* 12 Pet. 522, 610. In this connection, the observations of Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch 137, retain their full vitality (*Id.* at 165–166):

> * * * the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. * * * In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and

> cannot, at his discretion, sport away the vested rights of others.
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> The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

Herein, the President has directed the Attorney General to investigate and determine which organizations fall within the classifications of the Executive Order and to make this information available to those charged with the administration of the loyalty program. Although the Attorney General exercised his discretion in deciding which organizations came within the scope of the Executive Order, it is clear that the composition and publication of the list was done in the exercise of primary executive power, with the Attorney General acting as the agent and *alter ego* of the President. At the court below observed (R. 36), "the fact that they were done by the Attorney General, for and at the President's

direction, does not change their essential character as acts of the President himself."

Aside from the fact that the action of the Attorney General is thus not reviewable since it is, in contemplation of law, the act of the President, there is a further constitutional basis, one which emphasizes the political nature of the action here challenged, for considering the designation of subversive organizations as solely within the executive domain. Petitioner essentially demands that the Court restrain a cabinet officer from reporting to the President (or to the agency designated by him) the result of investigation undertaken pursuant to the President's order, on the ground that the report is erroneous. The President's power to require the opinion of the heads of the executive departments is an integral incident of his office (The Federalist, No. LXXIV) specifically provided for in the Constitution. Article II, Section 2.[22] No clause in the Constitution is meaningless, and least of all this one which "recognizes a public duty of high importance and value in critical times." Story, *Commentaries on the Constitution* (5th ed. 1891) § 1493.[23]

The Attorney General, a member of the Cabinet, having been directed by the President to

[22] See, also, R. S. 354, 356, 5 U. S. C. 303, 304.

[23] The authority of the President to require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their

determine and publish this list, had the clear duty under the Constitution to comply. That duty is delicate and complex, a duty given definition by the confidential relationship between the Chief Executive and his Cabinet. Determinations made by the heads of departments in the fulfillment of

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respective offices refers, of course, to the duties both of the President and of the officer, and has been so exercised.

"Mr. Jefferson has informed us that, in Washington's administration, for measures of importance or difficulty, a consultation was held with the heads of the departments, either assembled, or by taking their opinions separately, in conversation or in writing. In his own administration, he followed the practice of assembling the heads of departments, as a cabinet council. But he has added, that he thinks the course of requiring the separate opinion in writing of each head of a department is most strictly in the spirit of the Constitution; for the other does, in fact, transform the executive into a directory. 4 Jefferson's Corresp. 143, 144." Story, *supra*, Section 1493, note 4.

"We find abundant evidence, both in the public archives and in the printed correspondence and other writings of Washington and Jefferson, that it was the practice in their time for the President not only to call for written opinions of the Attorney General, as at present, and to advise orally or by informal correspondence with him and the three Secretaries, but also to require of all these officers written opinions upon critical subjects of executive deliberation, as expressly provided by the Constitution.

"Conspicuous illustration and evidence of these facts may be deduced from the extracts given in the text and the notes to Washington's writings. (See e. g., vol. x, p. 321, note; vol. x, p. 546, note.) In one of these cases it will be perceived that the Cabinet, so called, consisting of the Secretary of State, Secretary of the Treasury, Secretary of War, and Attorney General, though not in any sense an organized body with legal attributes as such, yet proceeded to act in concert, adopting joint rules, signed by them, as to the political and

that duty are essentially political, not judicial, in nature. They are decisions of a kind for which the judiciary neither has the responsibility nor the facilities to review. Cf. *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. 103; *Standard*

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military questions pending between the United States and France." 6 Ops. Atty. Gen. 326, 330 (Attorney General Cushing).

Although the Constitutional Convention rejected the suggestion of a privy council, and assumed that the President alone would be responsible to the nation for the acts of his principal officers, this clause was enacted in order that the President might have the advice, and the power to require the advice, of strong counsellors. And it is certain that there was no inhibition on the publication of such opinions. It was for the people to see and judge what these counsellors had advised.

Thus, James Iredell (later Mr. Justice Iredell) before the Constitutional Convention of North Carolina (Elliot: *Constitutional Debates* (1830) pp. 103–104):

"The next part, which says, 'That he may require the opinion in writing of the principal officers,' is, in some degree, substituted for a council. He is only to consult them if he thinks proper. Their opinion is to be given him in writing. By this means he will be aided by their intelligence, and the necessity of their opinions being in writing, will render them more cautious in giving them, and make them responsible should they give advice manifestly improper. This does not diminish the responsibility of the president himself. They might otherwise have colluded, and opinions have been given too much under his influence. * * * It is, however, much to be desired, that a man who has such extensive and important business to perform, should have the means of some assistance to enable him to discharge his arduous employment. The advice of the principal executive officers, which he can at all times command, will, in my opinion, answer this valuable purpose. He can at no time want advice, if he desires it, as the principal officers will always be on the spot. Those officers, from their abilities and experience, will prob-

*Scale Co.* v. *Farrell*, 249 U. S. 571; *Employers Group, etc.* v. *National War Labor Board*, 143 F. 2d 145 (C. A. D. C.), certiorari denied, 323 U. S. 735.[24]

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ably be able to give as good, if not better advice, than any counsellors would do; and the solemnity of the advice in writing, which must be preserved, would be a great check upon them."

And Mr. Gerry, before the Constitutional Convention:

"I am in favr. of a council to advise the Ex—they will be the organs of information of the persons proper for offices—their opinions may be recorded—they may be called to acct. for yr. Opinions. & impeached—if so their Responsibility will be certain, and in Case of misconduct their punishment certain—" Farrand: *Records of the Federal Convention of 1787*, Vol. I, p. 70.

Mr. Madison:

"Mr. Maddison [sic] was of opinion that an Executive formed of one Man would answer the purpose when aided by a Council, who should have the right to advise and record their proceedings, but not to control his authority." *Ibid.*, p. 74.

[24] Compare the long-established principle that mandamus will not issue to review non-ministerial acts. See *Decatur* v. *Paulding*, 14 Pet. 497, 515; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Carrick* v. *Lamar*, 116 U. S. 423, 426; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Ness* v. *Fisher*, 223 U. S. 683, 691–692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555; *Hall* v. *Payne*, 254 U. S. 343, 347; *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *United States*, 281 U. S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 208; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.*, 294 U. S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *Adams* v. *Nagle*, 303 U. S. 532, 542; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131–132; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*
H. G. MORISON,
*Assistant Attorney General.*
JAMES L. MORRISSON,
SAMUEL D. SLADE,
BENJAMIN FORMAN,
*Attorneys.*

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